LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 25 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 506

COMTEL CORPORATION, *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

GEORGE G. TYLER,
Counsel for Petitioners,
1 Chase Manhattan Plaza,
New York, N. Y. 10005.

September 22, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

COMTEL CORPORATION, *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 506

REPLY BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals is now officially reported at 376 F. 2d 791.

The First Question Presented

Respondent admits that there was in the instant case "the absence of an unconditional legal obligation to pay money" (p. 5), and that the court below decided "that there was a debt in the absence of a promise to repay" (p. 4). There can be no question, therefore, that the decision below is squarely in conflict with the legal premise upon which all the decisions cited at pp. 7-9 of the Petition were based—that there cannot be a debt for Federal income tax purposes (or for any other purposes) in the absence of an unconditional enforceable legal obligation to pay. That conflict cannot be reconciled by the assertion that Zeckendorf was "compelled" to exercise its option to purchase the Commodore shares. Such assertion means only that *at the time the option was exercised,* Zeckendorf believed that it was

more profitable to do so than not—a business decision that must be made by every holder of an option.

The Second Question Presented

Contrary to respondent's statement (pp. 5-6), petitioners do not contend that whatever the circumstances a court of appeals is obliged to consider any and every legal theory presented on appeal but not at the trial level. Petitioners contend, rather, that in the circumstances of this case—where a nonfrivolous legal argument is directed to an issue already present, no new evidence or findings of fact are required and the opposing party has had ample opportunity to respond—justice requires that the legal argument be considered by the court of appeals. That is the rule laid down by the decisions cited at pp. 13-17 of the Petition.* There is no room for discretion in that situation and *Hormel* v. *Helvering*, 312 U. S. 552 (1941), relied on by respondent, does not hold that there is. In *Hormel* this Court, while stating that ordinarily an appellate court considers only issues raised below, held that the court of appeals should have given and properly did give consideration to an argument made for the first time on appeal. And in a companion case, *Helvering* v. *Richter*, 312 U. S. 561 (1941), this Court reversed the decision of a court of appeals that had refused to consider the same argument made in *Hormel* and remanded the case so that the argument might be considered. Remand for the purpose of consideration of legal arguments not presented below was also ordered by this Court in *United States* v. *Shelby Iron Co.*, 273 U. S. 571 (1927).

---

*Respondent has frequently been the beneficiary of that well established rule. Respondent's opposition to its application in the case of a private litigant is surprising.

The circumstances relied on by respondent in support of the refusal of the court below to consider petitioners' argument are that it was novel and was made in only one paragraph without citation of authority (pp. 5-6). Such objections are manifestly without substance. Is a new application of existing law thus to be ignored and brevity of expression thus condemned?

What valid purpose could be served by adopting respondent's position? Considerations of economy of judicial time and the orderly administration of justice are certainly not involved, for all the court below had to do was decide, on the basis of the facts before it and the arguments of counsel for both sides, whether petitioners' interpretation of the law was correct.* Petitioners ask this Court to remand the case to the Court of Appeals with directions to make that decision.

Respectfully submitted,

GEORGE G. TYLER,
Counsel for Petitioners,
1 Chase Manhattan Plaza,
New York, N. Y. 10005.

September 22, 1967.

---

*Although petitioners are not asking this Court to consider the merits of their alternative argument, it should be noted that respondent has not attempted any refutation of it other than the bald statement that it is "without merit." Respondent has, moreover, so misstated the argument as to make it unrecognizable (p. 6n). Petitioners are *not* raising any question as to the meaning of the word "property" in Section 337(a). The Tax Court and the Court of Appeals both held that the property owned by Comtel was a "debt" owing from Zeckendorf. If that is so, Section 1232(a)(2)(A) requires that any income realized by Comtel on the payment of that debt be considered as "gain from the sale or exchange of property". Since Section 337(a) exempts from tax "gain . . . from the sale or exchange . . . of property," Comtel is not taxable on such income.